FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 498 - 499

AMERICAN LOCOMOTIVE COMPANY

Petitioner

vs.

CHEMICAL RESEARCH CORPORATION

Respondent

AMERICAN LOCOMOTIVE COMPANY

Petitioner

vs.

GYRO PROCESS COMPANY

Respondent

PETITION AND BRIEF OF AMERICAN LOCOMOTIVE COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION OF AMERICAN LOCOMOTIVE COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the defendant American Locomotive Company respectfully shows:

Petitioner seeks review of a decision by the United States Court of Appeals for the Sixth Circuit, filed De-

cember 8, 1948, affirming the denial by Judge Picard, holding the United States District Court for the Eastern District of Michigan, Southern Division, of the petitioner's applications in these actions for stays under Section 3 of the United States Arbitration Act (R. 402, 458, 508). That Court's opinion is not yet reported. It is printed in the Record at pages 508-518. Judge Picard filed no formal opinion.

The petitioner's right to arbitration is based on paragraphs 4 and 9 of the contract with Gyro Process Company, dated June 16, 1932. On that contract these suits are brought, and to it the petitioner, as successor in interest to Alco Products, Inc. and as its guarantor, was a party (R. 216, 225). The other defendants are certain of its officers and directors, and are not parties to this proceeding.

These suits were instituted in 1940 and were consolidated by order entered March 1, 1946 (R. ix). Both claim breaches by the petitioner of the 1932 contract to which, by endorsement at the end thereof, Chemical Research Corporation as majority stockholder of Gyro Process Company (the other plaintiff), became a party both beneficiary and obligated (R. 224). The Pure Oil Company, minority stockholder in Gyro Process Company, sold its stock to Gyro in December, 1939, and then ceased to have any interest in the contract (R. 414).

Gyro's suit is the principal suit. The questions discussed in this petition are common to both.

Summary and Short Statement of Matter Involved

This petition and the decision of the Court of Appeals involve the construction and application of Section 3 of the United States Arbitration Act (9 U. S. C. A.) which reads:

> "Sec. 3. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Italics ours.)

The Court of Appeals, in its opinion, decided:

1. The petitioner had not, by its letter of September 27, 1938, "cancelled the provisions thereof (the contract) providing for arbitration", or "lost any arbitration rights provided by the contract" (R. 514).

2. "The controversy falls within the arbitration provisions" (R. 515-16).

3. Whether petitioner's interposition of a counterclaim, in the Gyro suit "constituted a technical waiver by Locomotive of its contract right of arbitration", was expressly left undecided (R. 516).

4. The petitioner was "in default" within the meaning of the proviso in Section 3 of the Arbitration Act, and hence could not have a "stay" under that Section (R. 517-18).

5. This application of the words "in default" in Section 3 was made not as "a matter of discretion", but as a matter of "judgment" (R. 518).

In thus holding that the petitioner was "in default" within the meaning of Section 3, the Court of Appeals frankly acknowledged its creation of *a judicial conflict*, saying (R. 518):

> "In doing so we give the word a broader meaning than is attributed to it in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp. supra*, at page 989."

The decision thus referred to as not followed was by the Circuit Court of Appeals for the Second Circuit, reported in 126 Fed. (2d) 978, 989, and was reaffirmed by that Court in *Almacenes Fernandez, S. A.* v. *Golodetz*, 148 Fed. (2d) 625 (C. C. A. 2). We shall further show that the decision below was *also* in conflict with *Shanferoke* v. *Westchester Co.*, 293 U. S. 449. These basic *conflicts* will be analyzed in Points I and II, *post*.

The Court of Appeals below also held (R. 516-17):

> "Although Locomotive pleaded its contract right of arbitration, it was pleaded as a bar to the action with no reference to the provisions of the Arbitration Act. Under the Act, arbitration is not a bar, and in order to obtain the benefits of the provisions of § 3 thereof further action is necessary."

This statement refers to the fact that in its Answers in both suits, filed respectively in February, 1941, and November, 1942, the petitioner had pleaded as an affirmative "Defense" that under the contract of 1932 the controversy (R. 42, 424):

"should be heard and determined only by arbitration, as in said contract more specifically set forth; that no such arbitration has been had or demanded by said Gyro Process Company, plaintiff herein, and that plaintiff accordingly is not entitled to bring this action."

We shall show in Point II, *post*, that this Supreme Court and other courts have held that such an affirmative defense negates "default" within the meaning of the proviso in Section 3.

The petitioner respectfully challenges these rulings of law by the Court below as to the meaning of the statutory words "in default" and as to the irrelevance of the said affirmative Defense. The petitioner also challenges the Court's application of these rulings to the facts of the case.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254, of the United States Code.

The Statute Involved

The statute involved is the United States Arbitration Act (9 U. S. C. A.), a copy of the relevant sections of which is printed in the Appendix.

Brief Statement of the Facts

1. The suit of Gyro Process Company was begun on August 30, 1940, by a complaint which occupies fifteen pages of the Record, contained four Counts and asked as damages $5,250,000 (R. 1-15).

2. The suit by Chemical Research Corporation was begun on June 19, 1940, by a complaint which occupies six pages of the Record. It contained two Counts and asked as damages $5,000,000 (R. 409-15).

To both suits the petitioner promptly filed answers containing denials and affirmative defenses, including the aforesaid affirmative Defense that under the contract the controversy "should be heard and determined only by arbitration" (R. 42, 424). The answers contained counterclaims which, in its brief below, the petitioner expressly offered to have included in the arbitration. Both suits were consolidated on March 1, 1946 (R. ix).

3. In November 1940, and before the petitioner had answered Gyro's original complaint, Gyro asked for discovery "to enable it to elaborate and complete its Declaration" (R. 25-6).

Thereafter, and down to March 17, 1941, it procured a series of orders extending its time thus to amend and "to elaborate and complete its Declaration" until twenty (20) days after the conclusion of its discovery, and "staying all proceedings in the above case, except the taking of certain depositions and testimony on discovery" (R. 32, 72, 77, 80).

After an initial discovery session in early 1941, Gyro *suspended the discovery for five years* (R. 358-9) and did not resume it until September 1946 (R. 511). On February 25, 1946, Gyro had changed attorneys (R. 156).

4. On September 6, 1946, Gyro's new attorney stated, as his position, that the discovery related not only to issues already in the case but also

"to issues which may at some time after this date be injected into the case by amendments" (R. 361-2).

As late as November 6, 1947, Gyro's attorney said (R. 363):

> "We are trying to find out the facts so we can prepare a complaint that will be *a comprehensive, accurate complaint.*" (Italics ours.)

At last, on December 19, 1947, Gyro filed a so-called "Amended and Supplemental Complaint" which increased the number of Counts from four to six, increased the number of pages from fifteen to one hundred thirty-nine, and increased the damages asked from $5,250,000 to $36,285,000 (R. 158-296). It presented immense areas of new subject-matters, claims and issues,—some of them arising during *the seven years* since the starting of the suit by the original complaint (R. 163, 173, 181, 186, 200, 202, 210). Hence, the descriptive word "Supplemental" (R. 158). Counts III, IV, V and VI in the new complaint, totalling $36,000,000 in damages, were notably different from anything in the original complaint. Count IV in the original complaint was dropped. See Point II, subd. 2, *post*.

This new complaint was not a mere amendment of the original complaint. It was a complete substitution and supersession. It covered seven additional years. Hence, it was the practical equivalent of starting *a new suit*. See Point II, *post*.

In short, Gyro had for its own advantage kept the case for seven years *in the pleading stage*.

5. Thereafter, and before the defendants' time "to file their response" to this superseding Amended and

Supplemental Complaint had expired (R. x and 157; and Rule 12), *and hence before issue was joined,* the petitioner applied under Section 3 of the United States Arbitration Act for a stay pending arbitration (R. 299). Its moving papers alleged (R. 301):

> "5. American Locomotive Company is now, and has at all times been, ready, willing and desirous of having all the issues involved in this action submitted to arbitration pursuant to the terms of the 1932 contract, but no such arbitration has been had or requested by the plaintiff or by Chemical Research Corporation."

Questions Presented

1. What, in view of the judicial conflict acknowledged to be created by the decision below, is the true interpretation and application of the words "in default" in the proviso in Section 3 of the Arbitration Act? See Point I, *post.*

2. In view of the conflict between the decision below and the decisions of this Supreme Court and other courts as to the relevance and effect under Section 3 of an affirmative defense pleading the right to arbitration, what is *now* the law on this important subject? See Points II and III, *post.*

3. Can a defendant, who immediately pleads the agreement to arbitrate as an affirmative defense to the original complaint, be held "in default" under the proviso of Section 3 when he promptly applies for "a stay" within his time to respond under Rules 12 and 15(a) to a super-

seding "Amended and Supplemental Complaint"? See Point III, *post*.

4. Can a defendant who so pleads to the original complaint, and who is then confronted by the plaintiff with discovery proceedings and a stay for the avowed purpose of substituting a superseding complaint with new issues and additional claims and subject matters, be held to be "in default" under Section 3 if he applies thereunder for a stay while the case is still in the pleading stage under Rule 12? See Point III, *post*.

5. Is the Court's decision that Section 3 may not be effectively utilized at a time when the petitioner was still entitled, under Rule 12 of the Rules of Civil Procedure, to move, object, respond, and plead defenses, claims and cross-claims, whether equitable or otherwise, reconcilable with the Act itself, with Rule 12, and with the decisions in the *Shanferoke* case, 293 U. S. 449, and other cases which we will cite in the ensuing brief? See Points II and III, *post*.

6. Is the Court's restrictive concept of the scope and role of arbitration under the Arbitration Act sustainable in view of the contrary and wider concept in prior decisions by the Supreme Court and other courts, and made manifest by the text, history and purpose of the Act itself?

Reasons Relied On for the Allowance of the Writ

1. The Court below has expressly acknowledged its conflict with the Circuit Court of Appeals for the Second Circuit in the *ratio decidendi*, to-wit, its interpretation and application of the words "in default" in the proviso in Section 3.

2. As we shall show in the ensuing brief, its interpretation and application are also in conflict with decisions by the United States Supreme Court and by other courts.

3. The question whether covenants for arbitration are pleadable and effective (to quote this Court in the *Shanferoke* case, 293 U. S. 449, 452) as "an equitable defense or cross-bill" *under the Arbitration Act*, is a question of law of general importance and of vital concern to the business community, the administration of jurisprudence and the whole public policy as to arbitration.

4. The policy of settling disputes by arbitration, and the reflection of that policy in the broad and comprehensive sanctions in the United States Arbitration Act, are of vital and constantly increasing importance to the economy and jurisprudence of the nation.

Hence, a restriction on its use and availability by a judicial interpretation broadening the operation of *the proviso clause*, urgently calls for review by the court of last resort,—particularly where such interpretation is the subject of acknowledged judicial conflict.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for review and determination, on a day certain to be therein named, a certified transcript of the record and proceedings herein; and that the petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, January 4, 1949.

Respectfully submitted,

AMERICAN LOCOMOTIVE COMPANY,
Petitioner,

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BRIEF

POINT I

The interpretation by the Court below of the words "in default" in Section 3 of the United States Arbitration Act is in admitted conflict with that of the Circuit Court of Appeals for the Second Circuit in the *Kulukundis* case.

It is also, we submit, in conflict with the decisions of the Second Circuit and of this Court in the *Shanferoke* case, and with the decision of the Second Circuit in the *Almacenes* case.

Moreover, it is in conflict with the plain meaning of the word "default" in Section 4 of the same Act.

1. As already stated, the Court below admitted that its result was arrived at by adopting "a broader meaning than is attributed to it (the word 'default' in Section 3) in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, supra, at page 989" (R. 518).

In reality, this admission was an understatement, for the Second Circuit in the *Kulukundis* case refused to regard even "delay" as relevant, much less equivalent, to "default", and construed the word "default" in the proviso as applying to an entirely different situation.

In the *Kulukundis* case (126 Fed. [2d] 978), the answer to the libel did not refer to arbitration but, on the contrary, by affirmative defenses denied both the alleged charter party and jurisdiction in admiralty. The libelee then propounded certain interrogatories; and, nearly a year after the libelant had responded thereto and five

months after the case had been marked ready for trial, the libelee moved for leave to amend its answer by setting up as an affirmative defense that the charter party (which it had denied and continued to deny) contained a provision for arbitration which the libelant had not invoked before suing. (See Record on Appeal therein.) The District Court denied the motion to amend; but the Circuit Court of Appeals for the Second Circuit reversed and held that the motion to amend should have been granted, and that, if the facts stated in the proposed affirmative defense were established, the District Court should, by granting a stay, require the case to go to arbitration. The Circuit Court of Appeals said (p. 989):

> "There remains to be considered the language of Section 3 of the Act, that 'on application,' such a stay shall be granted 'providing the applicant for the stay is not in default in proceeding with such arbitration.' We take that proviso to refer to a party who, when requested, has refused to go to arbitration or who has refused to proceed with the hearing before the arbitrators once it has commenced. The appellant was never asked by appellee to proceed with the arbitration; indeed, it is the appellee who has objected to it."

The Second Circuit then proceeded to discuss its earlier and like interpretation of the same proviso in the *Shanferoke* case, pointing out that its decision in that case had been affirmed by the Supreme Court. In the *Shanferoke* case the defendant had pleaded as "a special defense" precisely what the petitioner here had pleaded (R. 42), to-wit, the arbitration covenant and its willingness to arbitrate. The Second Circuit had upheld the efficacy of this affirmative defense and granted a stay under Section 3. It said at 70 Fed. (2d) 297, 299:

"The plaintiff further objects that the defendant is 'in default in proceeding with such arbitration,' within the meaning of section 3. True, it has not named its arbitrator, but in its answer and moving affidavits has merely expressed its willingness to submit to arbitration. This appears to us enough. It was the plaintiff who declared the contract to be at an end; and with that the defendant was contented. If the plaintiff meant to proceed further and enforce a claim for damages, the initiative rested upon it; it should have named the first arbitrator. *If it did not but sued instead, it was itself the party who fell 'in default in proceeding with such arbitration,' not the defendant.*" (Italics ours.)

This interpretation and application of Section 3 and of the efficacy of just such an affirmative defense as was pleaded in the instant case, was expressly adopted and affirmed by the Supreme Court on the appeal in the *Shanferoke* case (293 U. S. 449). To quote (p. 453):

"*Third.* The plaintiff also contends that the defendant was not entitled to a stay * * * because, on the facts developed by the affidavits, the defendant appears to have waived its rights under the arbitration clause by unreasonable delay in demanding arbitration. The reasons why these contentions are without merit are sufficiently stated in the opinion of the Court of Appeals."

The decision of the Second Circuit in the *Kulukundis* case was reaffirmed by it in *Almacenes Fernandez, S.A.* v. *Golodetz*, 148 Fed. (2d) 625, 627-8 (C. C. A. 2) where a stay under Section 3 was granted notwithstanding that the defendant had pleaded affirmative defenses and a counterclaim and had moved to bring in seven third party defendants, and notwithstanding that about six months

elapsed before it moved for a stay. See discussion of and quotation from this decision in Point II, *post.*

2. The Second Circuit's interpretation of "default" in Section 3 is also clearly confirmed by Section 4 wherein that word repeatedly occurs.

Section 4 reads:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served *upon the party in default.* * * * If no jury trial be demanded *by the party alleged to be in default,* or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, *the party alleged to be in default* may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or *that there is no default in proceeding thereunder,* the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and *that there is a default in proceeding thereunder,* the court shall make an order

summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." (Italics ours.)

The purpose of the proviso at the end of Section 3 is to prevent a contracting party from blocking *both* the judicial and the arbitrational methods of determining controversies with the other party. He may not hold the judicial method in suspense if he is already, by refusing to proceed with arbitration, holding the arbitrational method in suspense. Section 4 shows that one who is holding the arbitrational method in suspense by refusing to cooperate in determination by arbitration, is regarded as being "in default" within the meaning of that Section. The two Sections, read together, prevent a litigant from effectively blocking a determination by either method of trial, or from blocking either method of securing arbitration.

POINT II

Moreover, for seven years Gyro avowedly kept the case in the pleading stage, for the express purpose of an ultimate superseding complaint.

Nevertheless, the petitioner immediately pleaded its right to arbitration; and, when the superseding "Amended and Supplemental Complaint" was filed, the petitioner immediately responded within the time allowed by Rules 12 and 15(a) by an application for a stay under Section 3.

Hence that application was a proper and timely response under Rules 12 and 15(a) and was also a proper and timely "equitable defense and cross-bill" under *Shanferoke* v. *Westchester Co.*, 293 U. S. 449, 452.

The holding below that petitioner was "in default" conflicts with both the Rules and the decisions, and confines the stage of pleading to "a one-way street" for Gyro's benefit. Gyro could at its leisure substitute an Amended and Supplemental Complaint, but the petitioner could not exercise the full right of response thereto given it by Rules 12 and 15(a) and by the procedures of law applicable to the pleading stage.

(1) This Court has specifically held that such a motion under Section 3 is in the nature of "an equitable defense or cross-bill" (*Shanferoke* v. *Westchester Co.*, 293 U. S. 449, 452).

In *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 Fed. (2d) 381 (C. C. A. 2), the Second Circuit held that Section 3 "modifies the procedure *only* by substituting arbi-

tration as the mode of trial", and neither bars nor is barred by "the usual provisional remedies" in the action (p. 384).

(2) As set forth in the foregoing petition, Gyro procured at the very outset sweeping orders for discovery and general stay, sought and granted for the very purpose of enabling it "to elaborate and complete its Declaration" (R. 77), and to enable it to inject new "issues into the case by amendments" (R. 361-2, 481-2). Thus Gyro for its own advantage kept the case in the pleading stage.

Ultimately, Gyro filed its "Amended and Supplemental Complaint" on December 19, 1947 (R. 158).

As already stated, this new pleading was *a complete substitution and supersession*. In comparison with the original Complaint, it increased the Counts from four to six, the number of pages from 15 to 139, and the damages from $5,250,000 to $36,285,000 (R. 158-296). It also greatly extended the periods of time involved. Instead of speaking solely as of August 30, 1940,—the date of the original Complaint (R. 1),—it covered the intervening period from that date to the date of the filing of the superseding Complaint on December 19, 1947 (R. 158). Thus, in paragraph 14 (adapted and repeated in connection with each of the Counts, R. 173, 181, 186, 200, 202, 210), it referred to acts and conduct of the defendant since June 16, 1932, not only "up to and including the date of the commencement of this suit" but "also to the date of filing of this Amended and Supplemental Complaint" (R. 167)—*an additional period of over seven years after the commencement of the suit*. Hence, the descriptive term "Supplemental" was an accurate characterization of new and imposing claims.

As a matter of practical reality this new superseding pleading was the commencement of a new suit.

Thus, Gyro itself had purposely kept the case continuously *in the pleading stage* from November, 1940. Hence, when on December 19, 1947, it filed a superseding complaint with supplemental charges covering the whole fifteen years from the making of the contract to that date, it automatically extended the stage and scope of response as authorized in Rules 12 and 15(a) and automatically endowed the petitioner with all the various rights granted by those two Rules and by the procedures of law applicable to the pleading stage. It was not confined to any of the responses it had made to the original complaint.

As the Sixth Circuit said in another case, *Grubbs* v. *Smith*, 86 Fed. (2d) 275 (certiorari denied, 300 U. S. 658):

> "But whatever the plaintiff's intention, as a matter of law the amended and substituted petition superseded the prior pleadings in the case."

In *Almacenes Fernandez, S. A.* v. *Golodetz,* 148 Fed. (2d) 625 (C. C. A. 2), the Second Circuit cited with approval the holding in *Short* v. *National Sport Fashions, Inc.*, 264 App. Div. (N. Y.) 284, that a demand for arbitration made *after* the service of an amended pleading and before the time to respond thereto had expired, was timely, because *"the action at law was still in the pleading stage"* (p. 285).

(3) To deny the petitioner the right of responding with a Section 3 application at a time when it could have responded with any other motion, objection, defense, claim

or cross-claim, legal or equitable, wholly violates Rules 12 and 15(a) and also this Court's concept of such an application as "an equitable defense or cross-bill" as declared in the *Shanferoke* case (293 U. S. 449, 452).

In that case this Court, holding that the denial of a petition for a stay of trial under Section 3 was appealable under former Section 129 of the Judicial Code, said that such a petition was "an equitable defense or cross-bill" (p. 452).

In so holding, this Court adopted its discussion of equitable defense and cross-bill in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, decided the same day. In the *Enelow* case this Court, discussing Section 274b, said that (p. 382):

> "Equitable defenses were permitted (by § 274b) to be interposed in actions at law 'by answer, plea or replication without the necessity of filing a bill on the equity side of the court.' *The defendant is to have 'the same rights' as if he had filed a bill seeking the same relief.*" (Italics ours.)

An equitable cross-bill may be brought at any time. In the *Enelow* case this Court at page 383 cited *Ford* v. *Huff*, 296 Fed. 652, and *American Cyanamid Co.* v. *Wilson & Toomer Co.*, 62 Fed. (2d) 1018, cert. den. 289 U. S. 735, both decisions of the Court of Appeals of the Fifth Circuit.

In *Ford* v. *Huff*, *supra*, the Circuit Court of Appeals sustained an equitable plea filed a number of months after the joinder of issue in an action at law. The District Court said that "such plea can be offered at any stage of the proceedings before the trial is actually had" (289 Fed. 858, 869). In consequence, the Court of Appeals sus-

tained the plea on the merits, and held its filing to be timely on the very ground that "at the time" an amended pleading was "proper" (296 Fed. 654). See also Rule 15(a).

In the later *American Cyanamid* case, *supra,* 62 Fed. (2d) 1018, an equitable plea was filed in an action at law *after two trials* of that action. The same Court of Appeals held the plea timely, saying at page 1020:

> "Nor do we think the fact that the plea was first presented to the court on the very eve of trial at law and after there had been previous trials prevents its due consideration. Under the old practice proceedings at law could be enjoined by a defendant in order to assert a good equitable defense at any stage, either to stay trial, to stay execution, or sometimes to stay the money in the sheriff's hand or his execution of a writ of possession. *Burnes* v. *Scott,* 117 U. S. at page 588."

In the *Enelow* case (293 U. S. 379) this Court specifically cited with approval (p. 383) this page 1020 of the opinion in the *American Cyanamid* case.

(4) Moreover, an application under Section 3 for a stay pending remission of the issues for trial by arbitration bears an analogy to an application for remission of the issues (whether in a jury case or otherwise) to a special master for an advisory opinion.

This analogy was drawn by the Circuit Court of Appeals for the Second Circuit in the *Mitsui* case, 146 Fed. (2d) 381, 383:

> "Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule

39(c), 28 U. S. C. A. following section 723c. That is the whole effect of § 3."

Such an application for a special master, with accompanying request for a stay, cannot be made under the rules of law until *after* issue is finally joined.

Rules 16 and 53 of the Rules of Civil Procedure;
53 *C. J.* 695-6;
21 *C. J.* 606;
Michelson v. *Shell Union Oil Corp.*, 1 F. R. D. (Mass.) 183, 184.

A fortiori, an application under Section 3 for a stay pending the agreed mode of trial before a board of arbitrators cannot in law be condemned as "in default" in a case where the original complaint has been completely superseded, issue thereon has not yet been joined, and the defendant's time under Rule 12 to present as of right motions, objections, defenses and pleadings has not expired but has been thrown wide open by the plaintiff itself.

POINT III

Furthermore, in holding the petitioner "in default" under Section 3, by reason of submitting to Gyro's unappealable orders for discovery and for a stay pending the superseding of Gyro's original complaint, the Court below is in conflict with the decisions of this Court and of the Second Circuit that the usual provisional remedies are available under Section 3 and do not outlaw the right to move for a stay thereunder,—particularly where, as here, the defendant had promptly pleaded as an affirmative defense its right to arbitration.

The Arbitration Act "modifies the procedure only by substituting arbitration as the mode of trial."

1. Section 3 of the Arbitration Act provides only for a stay of *"the trial of the action."*

There is nothing in Section 3 limiting the rights of the parties to conduct interlocutory proceedings for the purpose of obtaining discovery of evidence for a new pleading or even for trial. On the contrary, those rights, as both this Court and the Second Circuit have unequivocally declared, continue to exist without impairment by that Section. The exercise of them or the submission to them does not constitute a "default" within the meaning of the proviso in Section 3.

Moreover, promptly after the start of the suit, the petitioner had pleaded as an affirmative defense its right to arbitration (R. 42), and Gyro knew that that defense was part of the pleading stage which Gyro was keeping open for a new complaint by it.

In *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 Fed. (2d) 381 (C. C. A. 2), the Second Circuit gave an extended and most informative discussion of the interrelationship between court actions and arbitration with special reference to Section 3. The Circuit Court said, at p. 384:

> "It was implictly assumed (by Congress) that actions brought under § 3 would proceed throughout in accordance with the practice, applicable to them if arbitration were not the method of trial."

The Circuit Court also said, at p. 384:

> *"We think an arbitration clause does not deprive a promisee of the usual provisional remedies, even when he agrees that the dispute is arbitrable.*
>
> "As we have seen, § 3 allows such actions to be brought upon contracts containing such clauses, and *modifies the procedure only by substituting arbitration as the mode of trial.* The promisee retains all those remedies after judgment that he has in any other action; * * * All these things considered, we cannot think that we should import into the section a limitation (on interlocutory proceedings), which language does not demand, which could operate over only part of the field (i.e., before judgment), and which, so far as we can see, would be as likely to defeat as to aid the purpose of the act." (Italics ours.)

In *The Anaconda* v. *American Sugar Co.*, 322 U. S. 42, the Supreme Court said of Section 3 (p. 44):

> "The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing

the action by attachment if such procedure is available under the applicable law."

In *Almacenes Fernandez, S. A.* v. *Golodetz,* 148 Fed. (2d) 625 (C. C. A. 2) the Circuit Court squarely held that various interlocutory proceedings by the defendant in the case did not bar it from applying for a stay under Section 3. The Circuit Court said (pp. 628-9):

> "The first (argument against the stay) is that the right to insist upon arbitration was waived by Golodetz & Co. when it answered the complaint with affirmative defenses and a counterclaim and when it invoked the jurisdiction of the district court to bring in third party defendants. * * * Such action did not indicate an intention on the part of Golodetz & Co. to abandon its right to insist on arbitration, which it had already alleged as a defense, and so fell short of a waiver of it."

These decisions fit this case like a glove and squarely conflict with the decision below.

In *Matter of Haupt & Co.* v. *Rose,* 265 N. Y. 108, the defendant had secured an order requiring plaintiff to state separately and number its causes of action, and plaintiff thereafter served an amended complaint accordingly. When the plaintiff argued that defendant had thereby waived its right of arbitration, the Court of Appeals held that the defendant was not required to choose until the amended complaint had been served. It said (p. 111):

> "When Rose served his complaint, Haupt & Co. was entitled * * * to have it framed as required by law before an imperative duty arose to make an election (as between court trial and arbitration) * * *. Here Haupt & Co., following the service of the

amended complaint, moved promptly and before its time to answer expired. The only election made by Haupt & Co. was to proceed by arbitration."

In *Matter of Catino Contracting Co.* v. *Gelson Realty Corp.*, 173 Misc. 239 (Sup. Ct. Bronx Co.), the Court said (pp. 241-2):

"None of the other steps taken by the petitioner in the City Court action, namely, its demand for a bill of particulars, its motion to preclude for failure of respondent to serve a bill of particulars, nor the making of a motion for judgment on the pleadings, constituted a waiver. These were all steps taken in an action in which the petitioner had pleaded the arbitration clause in the contract as an indication of an intent not to waive his rights under it."

2. All these decisions are in complete disagreement with the law as declared in the decision below.

They all hold that the institution of interlocutory proceedings or submission to them while the case is still in the pleading stage and before issue is finally joined, is neither a bar to nor a waiver of the right to enforce arbitration,—particularly where, as in this very case, the defendant had answered the original complaint with an affirmative defense based on the arbitration covenant itself (R. 42).

Under those decisions the test lies in the adopted mode of trial, not [illegible]here interlocutory proceedings looking to substituting new pleadings or gathering evidence.

The double error of the Court below lies, we respectfully submit, in interpreting the words "in default" as expressing the consequence of submission to such interlocutory proceedings and in then making that consequence

applicable as a permanent bar notwithstanding the coming of a superseding complaint equivalent in its character to the start of a new suit.

Both these errors inject serious restrictions and technical complexities into the broad policy of the United States Arbitration Act and should, we submit, be reviewed by the court of last resort.

3. Moreover, during this entire period the petitioner, so far from withdrawing or abandoning its affirmative defense based upon the arbitration covenants (R. 42), itself conducted interlocutory proceedings for the very purpose of establishing and fortifying that defense.

Thus, on May 27, 1942, the petitioner filed a "motion for deposition and discovery" "regarding any matter not privileged which is relevant to the subject matter involved in this pending action whether relating to the claim or defense of said petitioners or to the claim or defense of Gyro therein" (R. 96). The supporting affidavit expressly referred to the "separate defenses" as included in the objectives of the motion (R. 98, 100). The motion was granted in its entirety after an argument in which petitioner's counsel expressly asked for discovery "in connection with our special defense, *that they should first have resorted to arbitration*", and after the Court had indicated that a discovery for that very purpose was one "which I think they (the defendants) are entitled to" (R. 504-6).

Again, on January 29, 1946, two days before the expiration of the petitioner's time to answer Gyro's second (but not final) amended complaint, there was a hearing in court on petitioner's application for discovery of an enlarged and more specific list of Gyro's records. During that hearing the petitioner's counsel specifically rehearsed

the arbitration as what "we want" and asked discovery of all papers relative thereto (R. 487-9). The Court stated: "They (Gyro) will give you that" (R. 489); and thereupon included in its order for discovery by Gyro (R. 492):

> "(4) Any proposals or negotiations for *arbitration* under paragraphs 4 and 9 of Exhibit A attached to the plaintiff's second amended declaration." (Italics ours.)

Of course, in these hearings defense counsel spoke about the possibility of a "trial". Gyro had included in its discovery petition its intention to take issue on the affirmative defense as to arbitration (R. 78). Hence, a "trial" as to the applicability of that defense was always a consideration. Moreover, a "trial", whether by arbitrators or the Court, was inevitable.

4. In its opinion, the Court below made certain statements about "delay" which would be quite irrelevant if the Court had followed the foregoing decisions and had interpreted and applied the words "in default" in Section 3 in accordance with their true meaning,—and this quite irrespective of the world of difference between "delay" and "default".

Nevertheless, we wish briefly to comment on those statements as also, we respectfully submit, mistaken, fractional and inconsequential.

(a) The Court below states that Gyro might have "elected to handle the matter differently if the dispute was to be arbitrated" (R. 517).

This is pure speculation. The Record discloses no such claim, specification or proof by Gyro.

Moreover, the speculation is itself utterly refuted by Gyro's self-evident determination to accompany the very instituting of the suit itself with an eager and practically unlimited demand to search the petitioner's papers and examine its officers. Gyro had elected to sue and not to arbitrate. It had never offered to arbitrate. It followed its election with procuring an order freezing the case in the pleading stage while it prosecuted an unlimited fishing expedition in the petitioner's preserves. It chose to do so notwithstanding that it knew the petitioner's affirmative defense based on the right of arbitration.

Upon the argument of Gyro's petition on March 17, 1941, its then attorney, Mr. Groesbeck, said (R. 481):

> "At the time that this matter was up in December before your Honor, you gave very specific directions as to what should be done, and it was certainly our understanding of the matter that *all proceedings be stopped* until the order of the Court (for the discovery) was complied with. Now, we think that that ought to be followed." (Italics ours.)

(b) The Court below refers to the plaintiff's discovery proceedings as "expensive"(R. 517).

But these proceedings were begun by Gyro on November 25, 1940 (R. 22-7), even before the petitioner had filed its answer to the original complaint on February 8, 1941 (R. 33). The avowed purpose of the discovery was to enable Gyro to inject new subject matters, claims and issues and to file not only a superseding amended complaint but also a supplemental complaint (R. 361-3, 481-2). Ultimately Gryo did so use and climax its discovery.

An increase in claim from $5,250,000 to $36,285,000 leaves little room for sympathy over the matter of "expense".

(c) The Court below acknowledges "that Gyro can use in an arbitration proceeding the evidence it discovered through the discovery proceedings" (R. 517).

Hence, it certainly does not lie in the mouth of Gyro to claim that, because at its request the action was held in suspense and in the pleading stage until at its leisure it got set to file a superseding complaint, the petitioner thereby fell "in default" and forfeited, as regards the new pleading, a right expressly reserved to it by Rule 12.

(d) The Court below refers to "numerous agreed orders" during Gyro's discovery proceedings (R. 517).

But most of those orders were orders extending the petitioner's time to answer, and were made in view of Gyro's avowal that its preceding complaints were ultimately to be superseded by an altogether new complaint (R. 361-3). Indeed, the Court below, elsewhere in its opinion, expressly acknowledges that of these "agreed orders" "thirty-nine were entered extending the time (of Locomotive) to answer" (R. 510).

(e) The Court below states that "the discovery proceedings were started in May, 1941, but met objections from defendants, which required court rulings and clarifying orders" (R. 511).

There was only one court ruling, and that in June, 1941 (R. 358). After that ruling Gyro failed to "discover" for over five years (R. 358-9). Doubtless, this failure was due to a loss of interest in the action by Gyro's original attorneys, Messrs. Groesbeck & Sempliner (R.

66-7; 156; 489-90; 498-500). Mr. Van Auken was substituted on February 26, 1946 (R. 156). Obviously, if anybody was "in default", it was Gyro.

(f) The Court below, after referring to March 17, 1941, states that: "Numerous motions were thereafter actually made and passed upon" (R. 517).

But, actually, all such motions pertained to the discovery itself, except for the petitioner's motion to consolidate the Gyro and Chemical cases (R. v-ix).

(g) The Court below states that the petitioner "filed its motion for a stay on March 2, 1948, after a lapse of more than seven years" (R. 517).

We respectfully submit that this statement is scarcely fair, since it omits the facts that the plaintiff had waited for seven years to file its superseding complaint, and that petitioner had promptly moved for a stay under Section 3 before joinder of issue thereon and within its lawful time for any of the responses permitted by Rule 12.

(h) The Court below states that, after filing its answer in 1941, the petitioner made "no attempt" to proceed as to arbitration until it moved for a stay on March 22, 1948 (R. 517).

This is not accurate. Actually, in 1942 and again in 1946 the petitioner obtained orders against Gyro for discovery, for the very purpose of supporting its position "for arbitration under paragraphs 4 and 9 of the contract" (See Point III, subd. 3, *supra*).

POINT IV

The decision below is, we submit, also in flat contradiction of the fundamental principle of equity and justice that a party may not take advantage of or from his own default or delay.

Gyro was obligated to pursue arbitration. The 1932 contract expressly provided that disputes of the character specified in paragraphs 4 and 9 "shall be heard and determined *only* in the following manner", to wit, "arbitration" (R. 219, 221-2).

Instead Gyro sued and thereby it became itself the party "in default" (See *supra*, p. 15). Thereafter it delayed and froze the suit for seven years for the purpose of preparing a superseding complaint.

From the beginning Gyro was on notice that the petitioner had, by its answer, claimed *trial* by arbitration. It knew that the petitioner had secured orders for discovery in aid of its affirmative defense as to arbitration (Point III, subd. 3, *supra*).

Gyro now indulges in the irony of contending that, because for nearly seven years it never advanced the suit beyond the prospect of a new and superseding complaint by itself, the petitioner has lost the right to have "the trial" of Gyro's final allegations and ultimate claims conducted by arbitration as contracted.

Fundamental equitable principles, as well as the very terms and policy of the Arbitration Act, will not permit one contracting party to convert his own default, breach or delay into an advantage to himself and a forfeiture and penalty to the other party. To allow Gyro thus to capitalize on its own delinquency would be anomalous.

In *Modern Brokerage Corp.* v. *Massachusetts Bonding Co.*, 56 F. Supp. 696 (S. D. N. Y.), the Court characterized a similar contention at page 697 as

> "* * * a rather unusual objection which, if acquiesced in, would permit a party in an arbitration agreement to take advantage of his own default in order to relieve itself from a contractual obligation voluntarily assumed."

In *Spiller* v. *St. Louis & S. F. R. Co.*, 14 Fed. (2d) 284 (C. C. A. 8), there is the following statement of a familiar equitable principle (p. 288):

> "It is sound doctrine that, if a party interposing defenses of laches has been responsible for and substantially contributes to the delay, he is precluded from taking advantage thereof."

In *In re Indiana Concrete Pipe Co.*, 33 Fed. (2d) 594 (D. Ind.), a like principle is thus stated (p. 596):

> "Certainly a party cannot be charged with laches if the delay was induced by the party setting up the laches as a defense."

POINT V

Since the Court of Appeals disavowed deciding whether petitioner's inclusion of a counterclaim in its answer to Gyro's original complaint "constituted a technical waiver by Locomotive of its contract right of arbitration" (R. 516), we shall speak of the point only briefly.

1. It is impossible to see how inclusion in an answer of a counterclaim which expressly pleaded as an affirma-

tive defense the agreement for trial by arbitration (R. 42), could be a "waiver" of such a trial.

According to *Bennecke* v. *Connecticut Mutual Life Ins. Co.*, 105 U. S. 355, 359; and *Watkins* v. *Fly*, 136 Fed. (2d) 578, 580 (C. C. A. 5):

> "A waiver may be defined as the intentional relinquishment of a known right with both knowledge of its existence and an intention to reliquish it."

An intention to abandon a contractual right which is expressly asserted and relied on as a defense, is a contradiction in terms and in common sense.

Under Rule 13(a) and the principle of law which it embodies, the pleading of the counterclaim was "compulsory" since it arose out of the contract on which Gyro sued. Even if (contrary to the fact and the law) there was inconsistency between the defense and the counterclaim, nevertheless under Rule 8(e) of the Rules of Civil Procedure

> "a party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both."

In *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 Fed. (2d) 978 (C. C. A. 2), the original answer to the libel denied the execution of the charter party. It said nothing about arbitration. Nine months later and about two months before the case was to be reached for trial, the libellee moved to amend its answer to *also* plead, as a separate defense, that the charter party contained an arbitration clause which the libellant breached by bringing the suit. The denial of the motion was reversed by the

Circuit Court of Appeals which held that such inconsistent positions could be taken in the libellee's answer (p. 988), and that the libellee was not guilty of a "waiver" and was not "in default" under Section 3 of the Arbitration Act.

Almacenes Fernandez, S. A. v. *Golodetz,* 148 Fed. (2d) 625 (C. C. A. 2), presented elements far more persuasive of waiver; and yet a stay under Section 3 of the Arbitration Act was affirmed. The Circuit Court of Appeals, in ruling against the plaintiff-appellant's arguments, said (pp. 627-8):

> "The first is that the right to insist upon arbitration was waived by Golodetz & Co. when it answered the complaint with affirmative defenses and a counterclaim and when it invoked the jurisdiction of the district court to bring in third party defendants. * * * Such action did not indicate an intention on the part of Golodetz & Co. to abandon its right to insist on arbitration, which it had already alleged as a defense, and so fell short of a waiver of it."

The Circuit Court of Appeals cited (p. 628) *Short* v. *National Sport Fashions, Inc.,* 264 App. Div. (N. Y.) 284, which held that the failure of the defendants to claim the right to arbitrate in their original answer did not constitute a "waiver" where they served an amended answer asserting that right, since *"the action at law was still in the pleading stage"* (p. 285).

2. Moreover, the Arbitration Act is concerned with "the trial", not with pleading. See Point III, *supra.* To quote again the *Mitsui* case, 146 Fed. (2d) 381, 384, the Arbitration Act "modifies the procedure only by substituting arbitration as the mode of trial".

3. In the present case, not only had Locomotive in its *original answer* promptly asserted the contractual right of arbitration and had thereafter conducted discovery proceedings for the establishment and enforcement of that affirmative defense (Point III, subd. 3, *supra*, and R. 96-100; 487-9, 492, 504-6), but at the very time when the petitioner moved for a stay the suit was, by election and action of Gyro itself, "still in the pleading stage" and the petitioner possessed all the rights given by Rule 12 to move, make objections, assert defenses, claims and cross-claims and to serve a responsive pleading.

CONCLUSION

The petition for a writ of certiorari, as prayed for, should be granted.

Dated, January 4, 1949.

Respectfully submitted,

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APPENDIX A

Section 2 to 6 (inclusive) of the United States Arbitration Act (Title 9, United States Code Annotated).

Section 2. "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Section 4. "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner pro-

vided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. * * * If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

Section 5. "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

Section 6. "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 498, 499

AMERICAN LOCOMOTIVE COMPANY,
Petitioner,

vs.

CHEMICAL RESEARCH CORPORATION,
Respondent.

AMERICAN LOCOMOTIVE COMPANY,
Petitioner,

vs.

GYRO PROCESS COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

I

Respondent's brief studiously avoids the determining issue of law in conflict between Courts of Appeals, to wit: the meaning of the word "default" in the proviso in Section 3 of the National Arbitration Act.

The Court of Appeals below has acknowledged that its interpretation gives a different and "broader meaning than is attributed to" that proviso in the *Kulukundis* case

by the Court of Appeals for the Second Circuit. On the strength of that different interpretation, the court below has found "default"; and that different interpretation was obviously necessary to that finding.

We submit that this Supreme Court should resolve this conflict as to the meaning in law of this statutory exception to the present broad national public policy favoring arbitration, lest that policy become hobbled and vitiated by an erroneous interpretation of the proviso.

II

Respondent's brief further avoids the further controlling consideration of law that, irrespective of this conflict as to the interpretation of the word "default," defendant, which had promptly pleaded its right of arbitration in its answer to the original complaint, cannot possibly be held on any theory of law to have forfeited its rights "of equitable defense or cross-bill" while the action was still in the pleading stage.

The respondent gives no reason why *it* should enjoy the privilege of keeping this action in the pleading stage for seven leisurely years, while it formulated a massive new complaint, but the petitioner should be denied its rights under Rules 12 and 15(a), and while the pleading stage was fully open to it, to make immediate response in the form of an application under Section 3 of the Arbitration Act,—an application which this Court has called an "equitable defense or cross-bill." (See our Main Brief, Point II, p. 18.)

The respondent deigns to notice this matter of law only for a third of a page near the end of its brief (p. 28). Yet involved in it is the potential of such a restriction of the National Arbitration Act by judicial expansion of an exception as to cripple, if not stultify, the broad public policy and purpose of the Act itself.

III

Respondent nowhere denies that Section 3 relates to a stay of *trial* only, leaving interlocutory proceedings to go on as usual (*Anaconda* and *Mitsui* cases, Main Brief, Point III); yet respondent continually reiterates, as constituting default, that petitioner participated in interlocutory proceedings. Petitioner in fact emphasizes the 40 consent orders extending petitioner's time to plead while respondent reformulated its pleadings. Yet these consent orders were obviously not waivers by petitioner of any of its rights, but, on the contrary, waivers *by the respondent* of lapse of time in petitioner's pleadings, waivers given by respondent not of courtesy to petitioner, but in recognition of the tentative character of respondent's then current complaint.

IV

There is no occasion to repeat here what is obvious and what we showed in our Main Brief (pp. 7, 19), to wit: that a 159-page amended and supplemental complaint asking for $36,285,000 is essentially different from a 15-page complaint asking for $5,250,000 damages.

But whether it is or not, the fact remains that respondent kept the case in the pleading stage for over seven years in order that it might, according to its own avowals, "elaborate and complete" its complaint, provide "a comprehensive accurate complaint," and set forth new "issues which may at some time after this date be injected into the case by amendments" (Main Brief, pp. 6-7).

Hence, respondent cannot be heard to say at this time that petitioner should be denied rights available to it according to law when served with an amended and supplemental pleading, on the unheard-of ground that respondent's own amendments were unnecessary or insubstantial.

The defendant had at the very outset and in its response to the original complaint recorded its insistence that arbitration was a condition precedent. It never withdrew that defense. On the contrary, during the period while the plaintiff was keeping the pleading stage open for service of its final amended complaint, the defendant obtained orders for discovery in substantiation of its defense that arbitration was a condition precedent. (Main Brief, pp. 28, 29.)

When, after seven years, the plaintiff finally razed its former pleading and replaced it with its present new and vast structure, the defendant had, as a matter of law, the right to respond by repleading its rights under the arbitration covenants and by applying for a stay in furtherance thereof.

V

Nor does respondent deign to deal with the point that from June 16, 1941 when the Court ruled on disputes as to the scope of the discovery (ruling largely in petitioner's favor), respondent took no action in its own discovery until August 17, 1946—a period of over five years (R. 358-359). Yet respondent accuses petitioner of delay!

Respectfully submitted,

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INDEX

CASES CITED

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GYRO PROCESS COMPANY,
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Brief of Respondents, Chemical Research Corporation and Gyro Process Company, in Opposition to Petition for Certiorari

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OPINIONS BELOW

The order of the District Court comprises a denial of petition by defendant American Locomotive Company, for stay of proceedings pending a requested arbitration (R. 402). The same has not been published in the official re-

ports. It is based upon that court's statements and conclusions printed in the record at pages 387-402, principally upon some seven years' delay on the part of Locomotive Company in requesting arbitration after institution of these suits, with intervening prejudice to the plaintiffs (R. 400-2).

The District Court also expressed his belief that the arbitration provisions of the contract did not extend to the present controversies involving, as they do, malicious or wilful misconduct, or questions of rights or patents (R. 394).

The opinion of the Circuit Court of Appeals has not been officially reported, but is printed in the record at pp. 507-518.

JURISDICTION

Jurisdiction has been invoked by American Locomotive Company under Title 28, Section 1254 of the United States Code.

STATUTE INVOLVED

The statute involved is the United States Arbitration Act (Title 9, U.S.C.A.) copies of Sections 2-6, inclusive, of which are printed in Appendix A to the brief of petitioner Locomotive Company, herein.

GROUND OF DECISION

The ground upon which decision was rested by both the District Court for the Eastern District of Michigan, and the Circuit Court of Appeals, Sixth Circuit, is tersely stated in the opinion of the latter court (R. 517):

> "The question really presented is whether Locomotive was 'in default' in not proceeding with the arbitration after filing its Answer and Counterclaim on Feb. 8, 1941."

The question was *solely one of fact,* no question of law being involved, and both courts found and held as stated by the Circuit Court of Appeals (R. 518):

> "In our opinion the delay on appellant's part in moving for a stay was unreasonable and inexcusable under all the circumstances and constituted 'default' on its part in proceeding with the arbitration."

There exists no basis for this application for certiorari either under the reasons outlined in Rule 38 (5) of the Rules of the United States Supreme Court, or otherwise, or under the principle announced by this court, that on questions of fact this court will follow the findings made by *two lower courts.*

In *Alabama Power Company vs. Ickes,* 302 U. S., 464 (quoting from p. 477):

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as un-

assailable. *Davis v. Schwartz*, 155 U. S. 631, 636-637; *Adamson v. Gilliland*, 242 U. S. 350, 353."

See also:

U. S. vs. O'Donnell (1938), 303 U. S. 501, 508 (condemnation of land);

Texas & No. R. Co. vs. Ry. Clerks, 281 U. S. 548, 558 (citing authorities);

Pick Mfg. Co. vs. G. M. Corp., 299 U. S. 3, 4 (citing authorities);

Brewer-Elliott Oil Co. vs. U. S., 260 U. S. 77.

Defendant-appellant could have presented its application for an arbitration stay promptly after its removal of the cases from the Michigan to the Federal Court on Sept. 4, 1940 (R. 404), and October 11, 1940 (R. v) respectively, and the opinion of the Sixth Circuit (following the decision of District Judge Picard) so found and held in the following language (R. 517-18):

> "The general nature of the action was apparent upon the filing of the original complaint. It could easily determine then whether it wanted arbitration or a trial by jury."

STATEMENT OF CASE

Locomotive's petitions for stay of proceedings for arbitration purposes, were filed in each the Gyro and Chemical cases on March 22, 1948 (R. x, 299, 407, 456).

This filing date was 7 years, 6 months and 22 days subsequent to the commencement of the Gyro suit (R. 1), and 7 years, 9 months and 3 days subsequent to the commencement of the Chemical suit (R. 409).

The original declaration (state court equivalent of complaint) was filed in the Chemical case on June 19, 1940, and Locomotive's original answer and counterclaim and amended answer and counterclaim thereto were filed respectively on February 8, 1941 (R. 404), and November 9, 1942 (R. 407, 417).

No amended declarations or complaints were subsequently filed in plaintiff's behalf in the Chemical case.

In the Gyro case, the original declaration was filed August 30, 1940 (R. 1).

Responsive to motion of Locomotive (R. 16) for a more definite statement or bill of particulars, Gyro filed an amended declaration on June 15, 1942 (R. 102), and Locomotive then filed its motion to dismiss or strike parts thereof. Meanwhile Locomotive filed its answer and counterclaim on February 8, 1941 (R. 33). Thereafter Gyro filed a second amended declaration on September 30, 1943 (R. 125), which was, at that date, its final complaint which

Locomotive so recognized and to which Locomotive secured 40 distinct orders extending time until May 26, 1947, to answer this second amended declaration (R. vi-ix).

Prior to March, 1946, the District Court had set the case for trial (R. 338, 400). But plaintiff's newly retained attorney then made motion to consolidate the two cases and fix the trial date at the June, 1946, term of court. Upon this motion Locomotive objected to consolidation and requested trial of the Chemical case in first order. *Locomotive stated that it was ready to go to trial on March 19, 1946, but if the cases were not then tried, they should go over until the fall, instead of the June, 1946, term* (R. 337, 338). On March 1, 1946, the order of consolidation was entered and the trial date fixed for the fall term (R. ix, 407, 455).

After extensive discovery proceedings on behalf of Gyro and Chemical with respect to Locomotive's books and records (R. 336-337), Gyro, with permission of court and adverse counsel (R. 157), filed its so-called amended and supplemental complaint on December 19, 1947 (R. ix, 158), and Locomotive secured orders extending to March 22, 1948, its time to make answer thereto (R. 157, 297, 298).

On March 1, 1946, an order was entered in District Court consolidating both the Gyro and Chemical cases and resetting the trial date as the 1946 fall term of court (R. ix, 407, 455).

Actual trial at said fall term was not possible in view of defendant's delays in the progress of plaintiff's discovery proceedings (R. 336, 375-386).

In Locomotive's pleadings, etc., prior to March 22, 1948, the arbitration clauses in controversy were pleaded *solely as a bar to suit* (R. 42, 424). No relief was sought in these pleadings under the United States Arbitration Act and no stay was applied for to enable arbitration. The only relief prayed was dismissal of the complaint (R. 43, 425).

Instead the arbitration defense in bar of suit, was joined with *various other defenses on the merits,* including Locomotive's own counterclaims against both Gyro and Chemical (R. 33-49 and 417-434).

When the order for consolidation of the two cases was entered on March 1, 1946, and fall term trial date fixed, Locomotive's attorney, Mr. Meek, did not ask for arbitration stay nor oppose court trial in the usual way, but simply expressed preference for trial of the Chemical case in first order, and preference as to particular trial dates, either on March 19, 1946, or over until the fall term (R. 337, 338).

The gravamen of these suits is the breach of contractual and fiduciary duties by Locomotive Company and its predecessor, Alco Products, Inc., in the performance of their contract to act, among other matters, as Gyro's agents for the licensing and promotion of sales for the use of Gyro's petroleum cracking processes for production of motor fuel and chemical intermediates. As such agents, Alco and Locomotive were required to carry on work for further development of the process and keep the same abreast of the times. Said agents were permitted to enter into their own separate contracts with licensees of Gyro, for the construction of petroleum refining plants (R. 216-224).

Among other transactions under the contract, Alco had sold for Gyro's account, a license to the Argentine Government Oil Fields for the so-called San Lorenzo plant, upon royalty payments to be made by the Argentine to Gyro in the sum of $160,000.00. The last $60,000.00 installment of this royalty was not to be payable to Gyro until after the acceptance by the Argentine of the sufficiency of Alco's plant under the guaranties contained in Alco's separate construction contract (R. 267-269). This plant was tendered for acceptance on March 29, 1938. But the Argentine claimed non-compliance with Alco's guaranties of plant capacity and refused to pay the final $60,000.00 installment to Gyro (R. 176, 317, 318).

In Gyro's first three declarations or complaints herein, Gyro made claim for damages against Locomotive for inability to collect this $60,000.00 installment (R. 6-8; 106-111; and 133-138).

But in May, 1946, Gyro brought suit in the courts of New York State against the Argentine directly for this amount. On June 4, 1946, the Argentine deposited $75,000.00 with the Manufacturers Trust Company of New York, in tendered settlement of the suit with inclusion of $15,000.00 interest from date of March 18, 1942, when the Argentine claimed the plant was finally finished by Locomotive in accordance with guaranties (R. 319, 320).

Gyro accepted this settlement, but Locomotive immediately attached the settlement proceeds in a suit which it then commenced against Gyro in the New York courts. Locomotive's New York suit was based upon the same claims which it was asserting against Gyro in the counter-

claim in the Gyro case below, namely claims for breach by Gyro of the same contract upon which Gyro itself was suing (R. 320).

Locomotive and Gyro then stipulated that the $75,000.00 so attached, be remitted to the United States District Court at Detroit to be held by the clerk of that court for disposition as directed by the final decree in the Gyro case below, and both parties agreed that the determination

> "of the validity, if any, of Locomotive's said claims, together with the determination of the validity, if any, of Gyro's defenses thereto, *including offsets and counterclaims, shall be made by the court in the Michigan case* (i.e., in this Civil Action 2165, the present Gyro suit in the courts below) (R. 321; 349-351)."

While this stipulation provided that the same should be without prejudice to the rights and defenses of either party in the subject matter (R. 351), it nevertheless also provided that the determination of such rights and defenses on the foregoing basis should be made *by the District Court* itself. Specifically the stipulation referred to the pending Gyro suit below and the controversies involved therein, and then stated "that the determination * * * shall be made by *the court* in the Michigan case" (R. 349-350).

The $75,000.00 was accordingly remitted to the District Court below, and is still held by the clerk of that court, to abide its final judgment or decree in the Gyro case (R. 352).

The parties, plaintiff and defendant, in both cases, have each taken discovery proceedings of their adversaries'

records, etc., for use in pleading and for use as evidence in the trial before the court.

For Gyro and Chemical discoveries, see R. 22, 28, 50, 71, 80, 336, 441 and 446, including five sessions in New York City and two sessions in Dunkirk, N. Y.

For Locomotive's discoveries, see R. 96, 101, 436, 448, 450 and 490.

The orders for Locomotive's discoveries were all secured upon its representation that the material solicited, was needed for simplification of the issues and for use as evidence *upon trial before the court.*

For example:

On June 22, 1942, Mr. Meek, attorney for Locomotive Company, in requesting an order for discovery and depositions, stated:

> "Mr. Meek: We ask this, Your Honor, with respect to this case for two reasons: In the first place, we want the depositions so that they can be used at the trial of this case, and we want the discovery so that it can be used for the purpose of preparing for the trial of the case (R. 497) • • •
>
> "The Court: Well, how long will this case take?
>
> "Mr. Meek: Well, Your Honor, how long it takes to try it will depend upon the extent to which we definitely fix the issues of this case before we start the trial, and the extent to which the parties have definitely lined up the evidence that they want to present. Now that is exactly what we have in mind in presenting this petition.

"The Court: Which case do you think should be tried first?

"Mr. Meek: * * * I should think the Gyro case would probably better be tried first * * * Now the thing that we want is to prepare this case in such a way that we aren't going *to be here in the trial of this case* over a period of a couple of years, or that we won't spend some twelve to thirteen days on it (R. 500).

"The Court: Well Mr. Groesbeck (plaintiff's attorney), the court is aware that he (Mr. Meek) is merely stating his side of the case the same as you are. * * * But they have asked for discovery of certain matters, certain of which I think they are entitled to, *and if it is going to expedite the trial of the case, and if I am going to try it without sending it to some other place, the master or somebody to take the testimony, I want to cut it down.*" (R. 505-506).

The order entered the same day granting defendants discovery, appears in the record at page 101.

On January 14, 1946, upon Locomotive's further application for discovery, its attorney, Mr. Meek, advised the court as follows:

"Mr. Meek: So we have filed this discovery with the idea of going over the minutes, agreements, correspondence, etc., before we got into court *so we can save the very time you asked us to save.* * * * Before we start the trial, we want to find out what those facts are, before we get into the trial, and *we can save the court* and ourselves a whole lot of time * * *" (R. 487).

The order in the Gyro case granting Locomotive this further discovery appears at record, pages 490, and see also R. 450 for a similar order in the Chemical case.

In addition to its own utilization of discovery procedure as above, Locomotive took the following, among other, steps in these cases, prior to its application for stay for arbitration, viz.:

> Secured order for more definite statement of plaintiff's claim (R. 16, v).
>
> Moved to dismiss, etc., plaintiff's first amended declaration (R. 122).
>
> *When plaintiff's newly engaged attorney applied for consolidation of cases, Locomotive announced its readiness to proceed with trial on March 19th, 1946, or in the fall term of 1946* (R. 337, 338).
>
> Allowed plaintiffs to take extensive and costly discovery proceedings in anticipation of trial of the controversies *by the court* (R. 336).
>
> Required deposit of plaintiff's $75,000.00 settlement proceeds from the Argentine, with the clerk of the District Court below in the Gyro case, for the court's determination of the parties' respective rights thereto, including the court's determination of Gyro's counterclaims and offsets to Locomotive's claims to said monies (R. 349, 350).

Locomotive's statement, petition page 7, that plaintiff's amended and supplemental complaint, hereinafter called final complaint—"presented immense areas of new subject matters, claims and issues, some of them arising during the seven years since starting of suit," etc., is completely erroneous.

Plaintiff's original and final complaints are all based upon the contractual relations undertaken between the parties on June 16, 1932.

Counts I and II of the final complaint, seek exactly the same relief as sought in the first declaration, except only that the final Count I *reduced* the claims of original Count I, by credit for the Argentine 1946 settlement recovery. (Compare R. 6-11 with R. 173-186.)

Count III of the *first* declaration concerning defendants' obligations for the sale of licenses and development of the Gyro process, sought recoveries, viz.:

(a) For defendants' failure to undertake aggressive action to sell licenses and use best efforts to develop and strengthen Gyro's patent position (R. 12).

(b) For defendants' failure to keep the process abreast of the times and properly developed (R. 12).

(c) For defendants' failure to hold for Gyro's benefit and, on the contrary, transferring to other persons, firms and corporations, defendants' inventions and improvements, etc., to the process and art of vapor phase cracking properly belonging to plaintiff (R. 12-13).

Count III of the *final* complaint simply itemizes defendants' improvements, etc., to the process and alleges, among other items, conversion thereof and conversion of plaintiff's own know-how, etc., by transfer, disclosure and conversion of the bulk of the same in year 1939, and subsequently, to Stone & Webster Engineering Corporation (R. 187-202). Reference is made in the final count to the value of said transfer, in light of World War II usage (R. 193),

but the conversion complained of is a particularized description only of the more general allegations on the same subject matter contained in paragraph 1 (c) of the original Count III (R. 12-13).

Count IV of the final complaint (R. 200-202), merely amplifies details of paragraph 1 (b) of original Count III (R. 12), as to the failure of defendants to keep the process abreast of the times.

Count V of the final complaint (R. 202-210), merely gives the details of plants constructed by defendants within the scope of paragraphs 1 (c) and 1 (d) of original Count III (R. 12-13), with respect to which defendants utilizing their improvements, etc., to the Gyro process, or utilizing other cracking processes, failed to protect Gyro's royalty rights therein.

Count VI of the final complaint (R. 210-215), seeks principally the transfer to Gyro of certain patents and improvements secured or developed and still retained by defendants within the scope of paragraph 1 (c) of original Count III (R. 12-13), together with damages for defendants' failure to disclose to Gyro information as to defendants' activities and process improvements under said agency contract within the scope of paragraph 1 (c) of original Count III (R. 12-13).

The Circuit Court of Appeals was wholly warranted in its statement (R. 517-18):

> "The general nature of the action was apparent upon the filing of the original complaint."

ARGUMENT

POINT I

The Court of Appeals did not commit error in holding (affirming the District Court) that Locomotive Company was in default under Sec. 3 of the United States Arbitration Act in its proceeding for arbitration.

1. The Arbitration Act specifies the procedure for relief under Sec. 3, as an "application" (to) stay the trial of the action until "arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*"

Title 9, U.S.C., Sec. 3, in part.

Section 6 of the Act provides that any application to the court under the Act shall (with exceptions immaterial here) be made and heard in the manner provided by law for the making and hearing of motions.

Title 9, U.S.C., Sec. 6.

When Locomotive, on March 22, 1948, finally made its motion for stay of proceeding, it purported to follow the above procedural requirements (R. 299, 456).

But this motion did not come until the lapse of 7 years, 6 months and 22 days in the Gyro case and lapse of 7 years, 8 months and 3 days in the Chemical case, after the dates of commencement of said cases respectively (R. 1 and 409).

These cases were both removed by Locomotive from State Court to Federal Court on dates of October 11, 1940 (R. v), and September 4, 1940 (R. 404), respectively, and the time intervals between dates of filing the transcripts in Federal Court and date of motions for arbitration stay, were 7 years, 5 months, 11 days and 7 years, 6 months and 18 days, respectively.

Locomotive could have presented its application for an arbitration stay promptly upon its removal of the cases to the Federal Court, and the opinion of the Circuit Court of Appeals (following Judge Picard; R. 400) very properly held in the following language (R. 517-18):

> "Nor was it at all necessary for Locomotive to wait to make such a motion until the amended and supplemental complaint was filed. The general nature of the action was apparent upon the filing of the original complaint. It could easily determine then whether it wanted arbitration or a trial by jury.
>
> "In our opinion, the delay on appellant's part in moving for a stay was unreasonable and unexcusable under all the circumstances and constituted 'default' on its part in proceeding with the arbitration."

However, in both cases, Locomotive filed its answers to the merits of controversy, *alleging the arbitration clauses as grounds only in bar and for dismissal of suit* (R. 42-3, 424-5). In said answers defendants included other and special defenses on the merits as itemized on R. 40-3, 421-5, and also counterclaims in each instance (R. 43-9, 425-434).

With the pleadings in such shape, Locomotive allowed the District Court and the plaintiffs to beleive for more than seven years that Locomotive intended to submit the

controversies to court trial, all as indicated by Locomotive's conduct of the case as follows:

Applying to the court for an order requiring plaintiff to make more specific statement of its claims.

Allowing plaintiffs to engage in extensive discovery proceedings preparatory for court trial instead of such preparation as would have been appropriate to arbitration.

Securing Locomotive's own discovery of plaintiff's records, evidence, etc., for *avowed purposes* of an actual court trial.

Formulating case pleadings with reference to court trial—not arbitration.

Presentation of the arbitration defense as a court question only, for complete dismissal of suit, without intimation of any intention to seek an arbitration under the United States Act or otherwise.

Consenting to or securing the designation of dates for actual court trial upon the issues framed as above.

Filing pleadings, making upwards of 10 motions, taking the time of the court and counsel upon upwards of 20 occasions, on hearings, arguments, etc., presenting for signature upwards of 50 orders and securing from plaintiff 42 extensions of time within which defendant could file its "responsive pleadings" or "Answers," instituting two separate suits in the U. S. District Court for the Eastern District of Michigan against the Chemical Research Corporation and the Gyro Process Company and their officers and directors, and also instituting an attachment suit in New York City, all of these suits based upon the same identical claims at issue in

the instant case, and by advising the court that it wanted discovery in order to "save a lot of time or we can wait until the trial and then before the jury and the court," etc. Applications for stay of proceedings are neither "responsive pleadings" nor "Answers," Rule 7 (a) and 12 (B), Rules of Civil Procedure.

Requiring the deposit into District Court below of Gyro's $75,000.00 Argentine settlement monies with written consent that all controversies between the parties concerning the subject matter thereof, be determined by the Dsitrict Court, with no mention of arbitration.

2. This course of conduct falls within the holding of the Fourth Circuit Court of Appeals where defendant was found in default under Sec. 3, viz.:

> "(3) Here when the plaintiffs chose to ignore the arbitration clause in the sales contract the defendant did not immediately, as was its duty if it intended to rely on the arbitration clause, assert its intention to enforce the arbitration; on the contrary, the defendant appeared and filed an answer to the complaint and set up a counterclaim for a large sum as damages claimed to be due to defects in the goods purchased. More than three months after this was done the defendant appeared and filed a written motion for continuance on the ground that a material witness was absent and upon showing the continuance was granted. It was only after the expiration of another six months, and on the day expressly agreed on as the day when the trial should be had, that the defendant, without giving notice, filed its motion to stay the trial pending arbitration, which it then sought to enforce.

> "By its course the defendant waived its right under the arbitration clause in the contract and was in default in proceeding with arbitration. * * *"
>
> *Radiator Specialty Co. vs. Cannon Mills, Inc.*, 77 Fed. 2d. (C.C.A. 4) 318, 319.

Contrasted with defendant's 9 months' delay, counterclaim on the merits and single motion for continuance of court trial in the Radiator case, the Sixth Circuit in the instant case most appropriately held:

> "In our opinion, the delay on appellant's part in moving for a stay was unreasonable and unexcusable under all the circumstances and constituted 'default' on its part in proceeding with the arbitration." (R. 517-8).

In the instant case, over seven years' delay has intervened, together with contests concerning the form and sufficiency of plaintiffs' pleadings; also expensive and protracted discovery proceedings have been had on both sides to secure evidence for *avowed purpose* of court trial. The issues of controversy including defendants' own counterclaim, were all framed in form for court trial; and announcement was made by Locomotive of its readiness for court trial on date as previously fixed (R. 337-8; 400). Furthermore, Locomotive started its own affirmative suit in New York State Courts against Gyro *upon the same subject matter in controversy in the present case*, and insisted as condition for discontinuance of the New York suit, that Gyro deposit the $75,000.00 Argentine settlement proceeds with the clerk of District Court below, *for that court's determination of said controversy*. See supra, pp. 8-9, 12.

In a case from the Fifth Circuit, four years' delay by plaintiff in application for arbitration in a suit which plaintiff itself had commenced, was held to constitute default.

> *La Nacional Platenara vs. North American Company*, 84 Fed. 2d (C.C.A. 5) 881.

Locomotive's authority, *Kulukundis vs. Amtorg Trading Corporation* from the Second Circuit Court of Appeals, holding that defendant Amtorg was not in default in proceeding with arbitration is not in conflict with the present holding of the court below. Amtorg, within 9 months from date of its original answer, filed its amended answer, containing, as shown by the opinion at page 989, a motion for arbitration. But the court rested its decision favorable to defendant on the finding that during said 9 months' interval:

> "*no steps of any importance (had) meanwhile occurred in the suit*" • • • (Opinions, pp. 980, 989).

Nor does the Shanferoke case, cited by Locomotive, from the Second Circuit, affirmed by the Supreme Court, conflict with the decision below.

In the Shanferoke case, the Supreme Court affirmed allowance by the Court of Appeals, of Section 3 arbitration to defendant, over plaintiff's objection of waiver and unreasonable delay.

The basis of this decision appears from the following excerpt from the Court of Appeals opinion:

> "The plaintiff further objects that the defendant is 'in default in proceeding with such arbitration' within the meaning of Section 3. True, it has not

named its arbitrator, but in its answer and moving affidavits has merely expressed its willingness to submit to arbitration. This appears to us enough. • • •

"The stay should be granted, *but the District Court will be free without the leave of this court to vacate it at any time, should it appear that the defendant is in default in proceeding with the arbitration.*"

Shanferoke Corp. vs. Westchester Corporation,
70 Fed. 2d (C.C.A. 2) 297, 299.
Affirmed 293 U. S. 449.

No question of unreasonable and prejudicial delay in the *Shanferoke* arbitration was involved, but even so, the court order provided protection to plaintiff in event that defendant might afterwards fail to pursue arbitration diligently.

Nor does the *Almacenes-Golodetz* case, also from the Second Circuit, conflict with the decision below.

There, Almacenes as purchaser of caustics had brought suit against Golodetz as seller for latter's misrepresentations as to the merchantable containers in which the caustics were shipped. Golodetz, as defendant, filed a counterclaim alleging that the contract of sale contained clauses providing that disputes should be settled by arbitration in New York under the rules of the American Arbitration Association, and that defendant had always been willing to arbitrate, but that plaintiff had broken its agreement so to do and was in default. The counterclaim not only prayed that the action be stayed and plaintiff be directed to arbitrate, but also alleged failure of plaintiff to give timely notice of contract breach.

Some six months later Golodetz filed a supplemental motion for an order staying action and requiring plaintiff to arbitrate. In this interim Golodetz had endeavored to join several third parties defendant against most of whom the complaint had been dismissed. The motion for arbitration was then granted by the District Court.

In affirming, the Court of Appeals stated:

> "* * * In *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 2 Cir., 126 F. 2d 978, * * * we held that there had been no waiver of the arbitration clause by answering the libel without insisting upon arbitration until the attempted amendment, *no 'steps of any importance having occurred meanwhile in the suit.'* In the instant case the answer did show that Golodetz & Co. relied upon the arbitration agreement, and unless its action in bringing in third party defendents amounted to a waiver it did not lose the benefit of that defense. * * * Those third party defendants were not parties to the arbitration agreement between the plaintiff and Golodetz & Co., and the latter's assertion of rights brings all parties in interest into court where their rights and liabilities could be adjudicated, if necessary, in proceedings following the termination of any stay granted pending arbitration. Such action did not indicate an intention on the part of Golodetz & Co., to abandon its right to insist on arbitration, which it had already alleged as a defense, and so fell short of a waiver of it."

Almacenes Fernandez S. A. vs. Golodetz,
148 Fed. 2d (C.C.A. 2) 625, 628.

The Almacenes decision depended upon the entire consistency between defendant's interim proceedings and retention of right to arbitrate. But in the instant case,

Locomotive's interim proceedings were consistent only with trial of the case by the court—*in lieu of arbitration.*

Each of these cases was decided upon its particular facts. In the Radiator and Platenara cases the facts adduced were found to constitute default. In Kulukundis, and Shanferoke and Almacenes cases the facts did not constitute default.

However, in the instant case, two courts have reached the same decision on the overwhelming facts, viz., that defendant is in default.

This situation presents no ground for certiorari.

Locomotive's attempts variously to avoid consequences of its own clear-cut expressions of intent to try these cases before the court, are not tenable:

(a) The claim that Locomotive was prevented from filing motion under Section 3, by reason of the District Court's freeze order in plaintiff's favor, is false.

The District Court, when staying proceedings pending discovery for filing plaintiff's responsive pleading to defendants' counterclaim, specifically stated that said stay should not prevent defendants, including Locomotive, from filing any other motions or pleadings, viz.:

> "I am not going to prevent either party from filing any motions or any pleadings that they want." (R. 482).

Locomotive had no misapprehensions as to Judge Picard's purposes concerning the stay order as thus expressed. Locomotive, pursuant to such understanding and during the period of continuance of said stay order, made the following among other motions in the Gyro case:

> For depositions and discovery (securing broad order for the same). (R. 96, 101.)
>
> To dismiss amended declaration or strike parts thereof (R. 122).
>
> To cancel bond releasing garnishment (R. vi).
>
> For taking further depositions and discovery on January 29, 1946 (and securing broad order for same). (R. viii, 490.)

The time of the court was taken up on many hearings on these motions.

Furthermore, said March, 1941, stay order was never once mentioned in the District Court below as an excuse for Locomotive's failure to make a motion for arbitration stay.

For example:

After the motion for arbitration had finally been made in April, 1948, Judge Picard, at the hearing thereon, questioned Locomotive's attorneys as to the reasons for delay, as follows:

> "The Court: Why haven't you had arbitration in the meantime?
>
> "Mr. Meek: I don't know." (R. 387).

The Sixth Circuit's own statement, at p. 517, is wholly warranted, viz.:

> "Nor do we give much consideration to Locomotive's contention that the court's order of March 17, 1941, prevented it from making the motion for a stay. It was clear from the statement of the district judge at the time that appropriate motions would still be received and considered. Numerous motions were thereafter actually made and passed upon. In any event, the order staying proceedings *in this case* during discovery, is not reasonably susceptible of a construction that would bar a motion to stay all proceedings in the same case."

(b) The inclusion in Locomotive's original answers of arbitration as a plea in bar, for the purpose of securing dismissal of suit, does not save its rights under the Arbitration Act.

As stated in the Kulukundis case hereinafter mentioned:

> "The Arbitration Act has eliminated the hostility to an executory agreement coming within Section 2, and, *while not making it a basis for a plea in bar,* now permits it to be made a basis of a stay order."

Kulukundis vs. Amtorg Trading Corp.,
126 Fed. 2d (C.C.A. 2) 978, 979.

From the foregoing, it is clear that a plea of arbitration in bar is not a good substitute for stay motion under the Act. Plea in bar gives no adequate notice to the court or adverse parties that actual arbitration is intended, so as to direct such adversaries' preparation towards arbitration, instead of trial.

See also the following from a Pennsylvania Federal District Court:

> "It should be noted preliminarily that the procedure provided in * * * the United States Arbitration Act, 9 U.S.C.A., Sec. 1 et seq., in cases where suits are instituted upon matters referable to arbitration under a written and enforceable arbitration agreement, is an application for stay of trial of the action until the arbitration has been had in accordance with the terms of the agreement * * * 9 U.S.C.A., Sec. 3. *Neither the state nor the federal statute provides for dismissal of the actions commenced in violation of arbitration agreements.*"
>
> *Karno-Smith Co. vs. School Dist.*, 44 Fed. Supp. (D. C. Pa.), 860 at 862.

And even in New York, where the statute is not as explicit as to the formal requirements for preservation of arbitration rights, the court has held that a defendant pleading arbitration in bar, must proceed promptly thereafter with his actual motion for arbitration, viz.:

> "Unreasonable delay in making the proper application may justify a finding of waiver. While the agreement to arbitrate is not itself properly pleaded either as a defense or a counter claim, when pleaded, it is no less an assertion that defendant does not intend to abandon his rights and so rebuts any inference that would otherwise be drawn from the mere service of the answer. * * * *But the arbitration law contemplates prompt action and too long a delay in seeking appropriate relief may be easily construed as an indication that this claim is waived.*
>
> "Upon the record before us the Appellate Division may have affirmed the order of the Special Term * * * because of the great delay on its part it intended to

waive what would otherwise have been its right. In view of this possibility, we may not interfere with the result reached by it. * * *

"Order affirmed."

Nagy vs. Arcas Brass & Iron Co.,
242 New York, 97 at 98, 99.

(c) Contrary to claims in its certiorari brief, pp. 28, et seq., Locomotive's discovery efforts prior to March, 1948, were not directed towards an actual arbitration of the controversy. They related instead towards the proof of the special defense that plaintiff was not entitled to maintain suit, toward the end of securing complete dismissal of suit.

The special defense so reads:

"that no such arbitration has been had or demanded * * * and *that plaintiff accordingly is not entitled to bring this action* (R. 42, 424) * * * *wherefore these defendants "demand" that the complaint herein be dismissed"* (R. 43, 425).

Locomotive's attorney characterized this defense as follows:

"Mr. Meek: We set up arbitration as a defense, *as a condition precedent to suit* (R. 388).

As late as 1946, when seeking further discovery in support of said defense, Mr. Meek further stated:

"Mr. Meek: That is what we want to do in this case. *Before we start the trial* we want to find out what those facts are, *before we get into the trial,* and

we can save the court and ourselves a whole lot of time. Of course what we don't get on discovery in advance, it will have to be done that way *during the trial.* The more we can limit that the better (R. 487).

* * * * *

"Mr. Meek: We want the contract proviso, Your Honor, if any of these parties were dissatisfied with the way * * * Alco performed the contract after a two year period, that Gyro or Chemical, or Pure Oil could call for an arbitration of that question, and that arbitration should decide whether or not there had been a breach of the agreement by Alco, * * *

"Mr. Meek: * * * There were three parties could seek the arbitration, Gyro, Chemical and Pure Oil. *We couldn't seek arbitration; they could.* We want to know what correspondence there was between any of those parties relative to arbitration of the alleged breach" (R. 489).

Right up to March, 1948, Locomotive took the position that it would not or could not, upon its own initiative, invoke arbitration—but was utilizing the arbitration clause simply *as bar to suit.* The claim otherwise at this time is incredulous, to say the least.

(d) Locomotive's claim that plaintiffs' Amended and Supplemental Complaint reopened Locomotive's election to arbitrate is also untenable.

Plaintiff's 1947 complaint, filed with permission of the court and consent of adverse counsel, introduced no new issues or controversies, see supra, pp. 12-14. *It merely reiterated the original issues concerning which Locomotive had expressed content to accept trial of the same before the court itself.*

The two lower courts specifically so held.

POINT II

There is no conflict between the decisions of the Court of Appeals in the instant case and the decisions of the Supreme or other Circuit Courts.

In this brief, at pp. 18-23 supra, the supposedly conflicting citations as claimed by Locomotive are analyzed and shown to be wholly consistent with the decision under present consideration. *The different results of such decisions were all reached upon important differences of fact, not difference in the enunciation of principles of law.*

But Locomotive claims that the Court of Appeals below expressly admitted conflict in its use of the term "default" as contrasted with the Second Circuit Court of Appeals, in the Kulukundis case. This is absolutely incorrect.

The attempt of Locomotive, in its brief, to pin the Second Circuit Court of Appeals to a restricted definition of the word "default" betrays a complete misconception of the holdings of that court.

The Kulukundis case does not support or warrant any restricted definition of the term "default." That court, in one reference in its opinion, p. 989, applied the word "default" to situations where a party has refused either: first, to institute an arbitration proceeding; or, second, refused to proceed with arbitration when once commenced. However, the Second Circuit did *not* restrict the meaning of "default" to such situations, but on the contrary ex-

pressly stated both in the two following paragraphs, and on page 980, that a third situation might arise where one party, having brought a court suit upon an arbitrable controversy, his adversary may thereupon accept the propriety of such suit and thereby waive arbitration. Upon the facts of the Kulukundis case the court held no such waiver was there to be found, for the reason that:

> "*no important intervening steps had been taken in the suit and no one had been affected by the delay*" (R. 989).

The court also commented to the same effect in its opinion on page 980, second column.

The Kulukundis opinion recognized the validity and soundness of *Radiator Specialty Co. vs. Cannon Mills* (4th Circuit), 97 F. 2d 318, in which defendant's waiver of arbitration had been established by the filing of answer and counterclaim and motion for continuance of trial. The court analyzed and distinguished the facts of that case from Kulukundis.

> NOTE: In the instant case the facts establishing Locomotive's waiver are much more aggravated and decisive than even in the Radiator case—see supra, pp. 5-12, 15-18, 24, 27-8.

The Second Circuit, in its subsequent decision in *Almacenes vs. Golodetz*, 148 F. 2d (2nd Cir.) 625, et seq., again affirmed the doctrine of waiver in the following language:

> "If one party does bring suit and the other party answers the complaint on the merits instead of relying upon the arbitration agreement, their conduct in so doing may amount to a waiver which will bind

them both. *Galion Iron Works v. J. D. Adams Co.*, 7th Cir., 128 Fed. 2d 411" (627).

"In *Kulukundis Shipping Co. v. Amtorg Trading Corporation* * * * we held that there had been no waiver of the arbitration clause by answering * * * without insisting upon arbitration until the attempted amendment, *no 'steps of any importance having occurred meanwhile in the suit'.*" (628).

The Sixth Circuit, in its decision in the instant case, followed the principle of law laid down by the Second Circuit in the Almacenes case.

There is, therefore, no conflict of law between the decisions of the Second and Sixth Circuits, nor between the Sixth Circuit and any other Circuit, or between the Sixth Circuit and this court.

POINT III

Answers to Certain of the Misleading Statements Contained In Petition and Brief of Locomotive.

The petition and brief for certiorari filed by Locomotive is replete with partial, misleading and incorrect statements.

We cannot, within any reasonable compass, attempt to answer all of them in detail. But a few instances may be briefly pointed out:

1. Locomotive endlessly alleges that plaintiffs have enlarged the nature and scope of, or added new issues to its complaint, and has included matters which have occurred since the commencement of the case, and that plaintiffs have purposely kept the case in its pleading stage. This is absolutely incorrect. Upon the contrary, plaintiff's entire case as set forth in the original complaint (Declaration) and in all subsequent amendments, is based upon the contractual relations between the parties as entered into June 16, 1932, and upon Locomotive's breaches of its duties and obligations, fiduciary and otherwise, thereunder. Locomotive moved for and secured an order on December 2, 1940, for a more specific statement (R. 16-22). Inasmuch as practically all of the information relative to such breaches and misconduct was in the possession of Locomotive, plaintiffs were obliged to secure as much of it as was possible by discovery proceedings. These were made as difficult and expensive as possible by Locomotive (R. 80-95, 375-86),

necessitating court hearings and orders and many trips to New York City and Dunkirk, N. Y. Resulting from discoveries thus extracted, Gyro, with the permission of the court, filed on December 19, 1947, its amended and supplemental complaint, in which it merely amplified and detailed the allegations supporting the breaches charged in the original complaint. This would have been accomplished very much earlier had Locomotive properly obeyed the court's orders for discovery.

The language of the Circuit Court of Appeals (R. 517-8), tersely and completely disposes of this claim now advanced by Locomotive:

> "The general nature of the action was apparent upon the filing of the original complaint. It (Locomotive) could easily determine then whether it wanted arbitration or trial by jury."

2. Locomotive incessantly alleges that it *promptly* pleaded arbitration in its answer. It however deftly evades stating that it did so only as a plea in bar of and for the complete dismissal of the entire action, which under the authorities it could not do.

The Circuit Court of appeals effectively demolishes this claim as follows (R. 516-17):

> "Although Locomotive pleaded its contract right of arbitration *it was pleaded as a bar to the action with no reference to the provisions of the Arbitration Act. Under the Act arbitration is not a bar, and in order to obtain the benefits of the provisions of Sec. 3 thereof, further action is necessary. Karno, Smith Co. v. School District*, 44 Fed. Supp. 860-862."

The discovery proceedings disclosed that Locomotive and its transferees are still using plaintiffs assets, rights and properties and are therefore enjoying the emoluments attendant upon such use following their conversion by Locomotive. This does not present any new issues, but goes to the question of damages and is so pleaded by plaintiff as it has the right to do. Damages accruing not only during the pendency of the suit but also in futuro are properly pleadable, provable and recoverable (R. 326-27).

3. Locomotive tirelessly repeats that it is now and always has been ready, willing and desirous of having all the issues involved in this action submitted to arbitration, etc.

If so, Locomotive has so successfully concealed such desire from 1940 to March 22, 1948, that no inkling, let alone evidence thereof, can be found at any place in the record. Defendants' answer and cross-complaint (R. 33-49), casually refers to the so-called arbitration provisions of the contract of June 16, 1932 (on R. 42), but does not demand nor express any desire to have arbitration of any character either under the U. S. Arbitration Act or otherwise. On the contrary it alleges solely (R. 42):

> "That no such arbitration has been had or demanded by Gyro Process Co., plaintiff herein, and that *plaintiff accordingly is not entitled to bring this action* * * * (R. 43). *Wherefore these defendants demand that the complaint herein be dismissed, etc.*"

That a plea in bar is not an application for arbitration see authorities, pp. 25-6-7, supra, nor is it any expression of willingness or desire for arbitration.

This plea in bar of the action has never at any time nor by any reference to be found in the record been altered from the date of filing the answer and counterclaim on Feb. 8, 1941, until March 22, 1948 (R. 456). During the intervening seven years, Locomotive had instituted and participated in the multitudinous court proceedings hereinabove referred to and enumerated.

Nothing can be clearer than that this present expressed desire for decision by arbitration is merely an afterthought.

Certainly neither plaintiff nor the District Judge would have granted upwards of 40 stipulations and orders extending defendants time to *answer* plaintiff's complaint, nor would they have expended the time of the court and counsel in upwards of 20 other hearings, arguments and discussions, nor have gone to the expense of lengthy discovery proceedings merely for the purpose of permitting defendant *thereafter* to apply for a stay of proceedings for arbitration.

The District Judge, after vainly asking Locomotive for its reasons for such concealment and delay, very properly excoriated defendant therefor (R. 393-4, 400):

Page 393:

> "The Court: And nothing was said to me about arbitration during all this period. Now, when I happen to tell you you are going to try this case in the fall and you have to be ready for it—and you knew all the time that these people have gone ahead here and gotten a new attorney who has spent a lot of time

—suddenly you come up with a desire for arbitration."

Page 394:

"The Court: All right, go ahead. Give me some reason why this comes to me as a virgin blow at this time to deprive me of this right I have been looking forward to for seven years to decide this lawsuit; and now I also learn there is going to be a jury demanded.

* * * * *

"The Court: The point you haven't answered yet is why you haven't brought this before the court long ago. It isn't a case of eight days or eight months, it is almost a case of eight years.

Page 400:

"The Court: * * * All of this time these people are going to this expense, going to Dunkirk, you permit them to go to Dunkirk, New York, the attorneys, and spend all that time getting witnesses, going to the trouble of getting records that you say would fill this court, *when eight years ago, and every day during those eight years you could have come into this court and said*: 'Your Honor, let's settle this point. We claim this matter should be determined by arbitration and that it has to be.' ***But you didn't do that.*** You know I am going to force you on in October, and for the first time in eight years I am confronted with your position that it is mandatory to have arbitration.

"Well, gentlemen, I am not going to argue any longer. I deny the motion, and you better get ready in the fall."

We therefore submit that there exists neither legally nor otherwise any basis for review by certiorari and ask dismissal of the petition therefor.

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Dated: January 20, 1949.